IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC.,
Petitioners,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association; GOLDEN GATE RESTAURANT ASSOCIATION, a corporation; and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, AN UNINCORPORATED ASSOCIATION

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OPINION BELOW

The opinion delivered in the Court below is reported at 542 F.2d 1076. The opinion was delivered on September 17, 1976 and Petitioners' Motion for Rehearing and Suggestion for Rehearing in Banc

were denied November 2, 1976. Petitioners' Petition was received by this Respondent on February 3, 1977.

JURISDICTION

Respondent San Francisco Local Joint Executive Board of Culinary Workers does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Respondent Local Joint Board submits that the Questions presented herein are as follows:

1. Whether alleged concerted efforts to influence a policy-making governmental agency to take action adverse to the interests of the Petitioner are immunized from liability under the Sherman Act by the provisions of the First Amendment to the Constitution of the United States.

2. Whether a vague and conclusory pleading is appropriate in a case where a Petitioner seeks redress for conduct which is prima facie protected by the First Amendment and the pendency of which will chill the exercise of First Amendment Rights.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right

of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATUTES INVOLVED

Sherman Act, Section 1 (15 U.S.C. §1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Rule 8(a)(2), Federal Rules of Civil Procedure:

Rule 8. "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

STATEMENT OF THE CASE

A. Nature of the case.

Petitioners are seeking a writ of certiorari from the opinion of the Court of Appeals which sustained the rulings of the District Court (1) granting Respondents' motion to dismiss on the ground that Petitioners failed to state a claim upon which relief can be granted and (2) refusing to allow Petitioners to file a Second Amended Complaint.

This is an antitrust action alleging a violation of Section 1 of the Sherman Act, originally filed on January 3, 1973, by two wholly owned subsidiaries of

McDonald's Corporation. An amended Complaint was filed on February 26, 1973.

One Petitioner is Franchise Realty Interstate Corporation (hereinafter FRIC), the company which allegedly secures sites on which McDonald's Restaurants are built. The second Petitioner is McDonald's Systems of California, Inc. (hereinafter MSC), a subsidiary of McDonald's Corporation, whose business is defined only generally by references in the Amended Complaint herein to the business activities of "the Company" (Petitioners' self designation).

The named Respondents are San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers (hereinafter Local Joint Board), a labor organization, which by its very nature does not compete with Petitioners; the Golden Gate Restaurant Association (hereinafter G.G.R.A.), an association representing restaurants in San Francisco; and the Hotel Employers Association of San Francisco (hereinafter Hotel Employers), a corporation representing a number of hotels in San Francisco. This response is filed on behalf of Respondent Local Joint Board only.

Essentially, the Amended Complaint[1] complains of the action by the Board of Permit Appeals in the City and County of San Francisco in overruling the issuance of permits to subsidiaries of McDonald's Inc. The Board granted some permits and then denied the Petitioners "the right to build and operate

[1]The Amended Complaint is set forth at Appendix E of the petition herein.

licensed restaurants" at three locations in San Francisco. (Amended Complaint, ¶14). Thus, while already operating two other restaurants in San Francisco (Amended Complaint, ¶11), Petitioners apparently complain that Respondents successfully induced and persuaded the Board not to issue additional permits for the construction of restaurants in San Francisco. (Amended Complaint, ¶14).

The Amended Complaint further alleges that "consistent, repeated and baseless opposition" to the permits was "the product of a combination and conspiracy entered into with the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's Restaurants and each such opposition was sham and frivolous. . . ." (Amended Complaint, ¶18). The combination and conspiracy to restrain trade and commerce in the restaurant business in the City and County of San Francisco was allegedly in violation of Section 1 of the Sherman Act (Amended Complaint, ¶16).

Finally, the Amended Complaint alleges that the "Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco," and that each Respondent was subverting "the contitutional function of the Board" and frustrating "McDonald's Restaurant as a competitive factor in the City and County of San Francisco." (Amended Complaint, ¶19).

B. Proceedings in the District Court.

Petitioners on January 3, 1973, filed their Complaint in the District Court and on February 26, 1973, Petitioners filed an Amended Complaint designed to correctly reflect the true names of the parties Defendant. Subsequent to the filing of the Amended Complaint, all three Respondents herein moved to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The District Court heard oral argument on these motions to dismiss on April 27, 1973, and then took the matter under submission. On May 8, 1973, the District Court filed a Memorandum of Opinion (Appendix B to Petition), in which Respondents' motions were granted on the ground that the acts alleged in the Amended Complaint were protected from the antitrust laws under the First Amendment to the Constitution of the United States. On May 14 and 22, 1973, judgments were entered in favor of all Respondents.

At the hearing held on April 27, 1973 Petitioners declined the opportunity to amend their First Amended Complaint.[2] The District Court in its Memorandum of Opinions thereon did not include a provi-

[2]The following colloquy took place between Petitioners' counsel and the District Court at the oral argument on Respondents' motions to dismiss on April 27, 1973:

> The Court: In the event that I do rule in favor of the moving parties, do you feel you could amend your complaint or do you want to take a straight shot on appeal?
>
> Mr. Blecher: I would like to consult with my clients about it. My own reaction would be we can't state it any better than we stated it this time. (I RT at 24)

sion allowing for such amendment. Thereafter, Petitioners made a motion to set aside judgment and for leave to file a Second Amended Complaint. The District Court on June 1, 1973, following oral argument, denied the motion. Petitioners then filed their Notice of Appeal to the Court of Appeals for the Ninth Circuit.

C. Proceedings in the Court of Appeals.

The Ninth Circuit by its opinion of September 17, 1976, affirmed the District Court's dismissal of the Amended Complaint and its denial of leave to file a Second Amended Complaint. Petitioners' statement of the case distorts the Ninth Circuit's opinion in a light most favorable to their position. However, the opinion most articulately speaks for itself in holding that the Amended Complaint alleges only activities immunized from antitrust liability by the First Amendment and by its very vagueness constitutes a potential chilling effect upon the exercise of First Amendment Rights by these Respondents.

REASONS FOR DENYING THE WRIT

I. THE NOERR-PENNINGTON DOCTRINE IMMUNIZED THE CONDUCT UPON WHICH PETITIONERS SEEK RELIEF AND WAS PROPERLY APPLIED BY THE COURT OF APPEALS AND DISTRICT COURT IN REJECTING PETITIONERS' CLAIMS.

The majority of the Court of Appeals quite properly held the alleged conduct of this Respondent to be immunized from antitrust liability under the Sherman

Act by an overriding societal interest in the free expression of ideas and unimpeded opportunity to seek redress of grievances from officials of government. This immunity was first articulated by the unanimous Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 356 U.S. 127 (1961) *("Noerr")*, reiterated and refined by the Court in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) *("Pennington")*. There the Court held:

> *"Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . .
>
> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

Petitioners' First Amended Complaint before the District Court, as well as its embellished proposed successor, allege nothing more of this Respondent than that it successfully engaged in such protected activity. Stripped of its conclusory allegations which are so vague as to be meaningless in any context, *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 693 (E.D.Pa., 1973), Petitioners' complaints herein arise purely and simply from Respondents' repeated political opposition to Petitioners' restaurant business before the Board of Permit Appeals of the City and County of San Francisco. That alleged conduct is clearly immune from antitrust liability.

> "The right of the people to inform their representatives in government of their desires with respect to the passage and enforcement of laws cannot properly be made to depend upon their intent in doing so." *Noerr*, supra, at 139.

Indeed, despite Petitioners' attempts to construe it otherwise, this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), supports the decisions of the Court of Appeals and District Court herein.

First, *Trucking Unlimited* makes clear that the antitrust immunity articulated in the *Noerr* and *Pennington* cases applies not only to advocacy before legislative bodies and the executive branch of government but also to such conduct before the Courts and administrative agencies,

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." 404 U.S. at 510-11.

Further, the Court held that the factual allegations of the Complaint in *Trucking Unlimited* enabled Petitioners there to overcome the *Noerr* immunity to antitrust laws. Those allegations set forth in specific detail a pattern of massive, concerted and purposeful conduct before governmental agencies by Respondents therein which was a sham designed to harass and deter Petitioners from access to those agencies. The

Court specifically held that Respondents decided to accomplish this objective, not by seeking to induce the PUC to change its policy, but rather, by discouraging the filing of applications with the PUC and ICC.

The nature of the Respondents' alleged conduct herein like that in *Noerr* and *Pennington* is precisely what immunizes it from antitrust liability. The Board of Permit Appeals of the City of San Francisco has a unique range of powers and duties. Section 3.651 of the Charter of the City and County of San Francisco defines the Board's functions and powers in terms so broad as to include review of every sort of permit issued or denied for whatever reason and at the instance of any person whether directly or indirectly affected thereby.[3] Its function is a classic example of democratic government and the important role that citizen communication plays therein. Under the Charter it performs a policy-making function rather than an administrative one.

Petitioners' sole complaint of this Respondent is that it appeared before the Board and opposed Petitioners' plans for restaurants both directly and indirectly through speaking and publishing its opposition in hearings and to members of the Board. Nowhere do Petitioners really allege that they were prevented from appearing and arguing their position. That they did so appear, present their case, and, on some occasions, lost is the price they must pay, albeit ungraciously, to conduct their business in a free society.

[3]Section 3.651 provides, in pertinent part:

"3.651 Functions, Powers and Duties

. . . [A]ny person who deems that his interests or property or that the general public interest will be adversely affected as a result of operations authorized by or under any permit or license granted or issued by any department may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of the same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

Indeed, the Board of Permit Appeals perhaps best illustrates the Court's observation of the impact of the First Amendment in *Thomas v. Collins,* 323 U.S. 516 (1945). There it held,

> "It is not an accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievance. All these, though not identical, are inseparable." 323 U.S. at 530.

The successful exercise of these rights to petition government is the sole wrong of which Petitioners complain and one completely immunized by the *Noerr* and *Pennington* decisions. The holdings in those cases recognize the preferred place that free expression must occupy in any judicial balance with other societal interests. *Thomas v. Collins,* supra, at 530, *Marsh v. Alabama,* 326 U.S. 501, 509 (1946), *Saia v. New York,* 334 U.S. 558, 561 (1948). Thus, the Court held in *Noerr,*

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws can-

not properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which government must act.

We . . . hold that, at least insofar as the railroads' campaign was directed towards obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U.S. at 139-140.

Nowhere in either the Amended Complaint or its proposed successor do Petitioners allege conduct by this Respondent which would remove that conduct from the protective shield of *Noerr* and *Pennington* on the basis of the so-called *Noerr* "sham" exception. As noted above, the mandate of the Board of Permit Appeals is to resolve broad questions of policy and not to operate as an administrator of policy predetermined by some statutory scheme. Thus the concern for the corruption of the administrative process by concerted efforts which underlies *Trucking Unlimited* and removed Respondents' immunity there is not present here.

The progeny of *Trucking Unlimited* clearly demonstrate that the absence of policy-making powers by the governmental entity sought to be persuaded by Defendants was a crucial factor in holding *Noerr* immunity to be inapplicable. In *Woods Exploration & Producing Company v. Aluminum Company of*

America, 438 F.2d 1286 (C.A. 5, 1971), *cert. den.,* 404 U.S. 1047, the Court found *Noerr* and *Pennington* immunity to be applicable because Respondents' conduct in falsifying forecasts to the Texas Railroad Commission was aimed at corrupting an administrative scheme rather than the formulation of policy. 438 F.2d at 1298. In *Israel v. Baxter Laboratories,* 466 F.2d 272 (C.A.D.C. 1972), the Court went so far in its concern for the integrity of the administrative process as to remand the matter to the Food and Drug Administration for further proceedings before ruling on Respondents' antitrust liability. 466 F.2d at 278-280.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (CA-7, 1975), cited by Petitioners is equally in accord with Respondents' position herein. There the Court holds that concerted action, even that which includes making or withholding monetary campaign contributions from members of the body sought to be influenced, is still immunized by *Noerr* and the First Amendment. 516 F.2d at 231.

The Court of Appeals herein succinctly held,

"The mere reversal of the grant of the three applications, at the urging of the defendants, suggests no more than 'that the plaintiffs and defendants met head-on before the Board and that plaintiffs lost,' as the district court noted in its opinion. The complaint fails to adduce any specific facts to support the conclusory allegation that defendants' opposition before the Board was 'sham' or 'frivolous'. This deficiency is hardly surprising, for we seriously doubt that any argument raised before the Board could be so characterized in view of the extremely broad standards

governing the exercise of that body's discretion." 542 F.2d at 1079.

If any damage has accrued to Petitioners it was at the hands of the Board. For such a wrong Petitioners have state remedies which have been exhausted outside these proceedings. Petitioners' efforts to expand this limited grievance into a multimillion dollar violation of the antitrust laws are thwarted by a complete absence of facts or legal authority to support such expansion. Petitioners cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case. See *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 at 343 (C.A. 9, 1969). The Court of Appeals properly rejected this effort as should this Court.

II. THE STANDARD OF PLEADING IMPOSED BY THE COURT OF APPEALS IS BOTH PROPER AND CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioners' petition insinuates that a strict standard of pleading which the Court of Appeals found appropriate to such a frontal assault on Respondents' First Amended Rights flies in the face of the liberal pleading rules set forth in Rules 8 and 12 of the Federal Rules of Civil Procedure. In fact, the Court's holding strikes a careful balance between the "notice pleading" requirements of the Federal Rules of Civil Procedure and the paramount position of the First Amendment in our society. It is consistent with both of these larger interests and singularly appropriate to the factual situation presented herein.

The Court below held,

> "What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-83.

The conduct of this Respondent of which Petitioners seek to complain is well within the purview of the First Amendment. The *Noerr-Pennington* concepts of antitrust immunity have at their heart the pre-eminent societal interest in free expression of ideas to government officials. Such First Amendment rights are both "indispensable" to a free society. *Thomas v. Collins, supra,* at 530, and to be encouraged in the operations of its governmental institutions.

The Court of Appeals took careful note of the very real chilling effect that the pendency of litigation, or even the mere threat of litigation has upon the exercise of First Amendment rights by concerned citizens such as this Respondent. See generally *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967); *New York Times v. Sullivan,* 376 U.S. 254, 277 (1964). This chilling effect upon free expression has even greater and more ominous impact when deliberately directed at a labor organization which is by its very nature a vehicle by which workers effectively exercise their rights to free expression and association. See generally *Brother-*

hood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5-6 (1964); *United Mine Workers of America v. Illinois State Bar Association,* 389 U.S. 217, 223 (1967).

The allegations of Petitioners' amended complaint are nothing more than a properly thwarted attempt to abuse the liberal, "notice pleading" requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. By making only vague, conclusionary allegations about Respondents' conduct, Petitioners seek to force the facts of this case into the wholly inappropriate pleading mold of *Trucking Unlimited.* The courts below, however, have not been deceived by those transparently conclusionary allegations and properly have ignored them in examining and dismissing Petitioners' complaint on First Amendment grounds. See generally *Oppenhein v. Sterling,* 368 F.2d 516, 519 (C.A. 10, 1966) *cert. denied,* 386 U.S. 1011 (1967).

There is nothing in Rule 8 or elsewhere in the Federal Rules of Civil Procedure to suggest that the otherwise valid interest in liberal construction of pleadings was ever intended to override the freedoms of expression and belief secured by the First Amendment. Indeed, legions of authority suggest that, where the two are in conflict, the latter must prevail. *Thomas v. Collins, supra; Marsh v. Alabama, supra; Saia v. New York, supra.* Obviously, Petitioners had an opportunity to state their case below in detail in their first amended complaint. Interestingly, such detailed allegations are made with respect to many less crucial aspects of their claim.

On the crucial issue of activities which would remove the alleged conduct of Respondents from the protection of the First Amendment as articulated in the *Noerr* and *Pennington* cases, nothing but bald conclusions are set forth. Petitioners would have the Courts entertain this action with its chilling effect upon Respondents' exercise of their First Amendment rights without ever alleging any facts in support thereof.

The proposed second amended complaint offered by Petitioners was properly rejected as well. While somewhat more verbose than its discredited predecessor in its attempt to stifle freely expressed dissent to Petitioners' oppressive labor practices, it adds nothing but adjectives to the woefully deficient factual framework previously rejected by the District Court. While leave to amend is ordinarily freely given, it is within the discretion of the trial court to do so. Absent a showing of abuse of that discretion, its exercise will not be disturbed on appeal and should not be disturbed here. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330 (1971).

Moreover, Petitioners were given an opportunity to amend their complaint by the District Court in the hearing on Respondents' motion to dismiss the first amended complaint and declined the offer in open Court (I R.T. at 24).[4] After such a refusal to amend and an examination of the absence of new substantial matter in the proposed second amended complaint, the Court properly concluded that nothing new was al-

[4]See Footnote 2, *supra.*

leged and leave was properly denied. *Downey v. Palmer,* 114 F.2d 116, 117 (C.A. 2, 1940); *Kirsch v. Barnes,* 157 F.Supp. 671, 672 (N.D.C.A. 1957) *aff'd* 263 F.2d 692 (C.A. 9, 1959).

Indeed, a review of the proposed second amended complaint and Petitioners' vacillating attitude toward offering amendment, indicates that said second amended complaint was not tendered in good faith. The oppressive chilling effect of this litigation upon the First Amendment rights of this Respondent is manifest. The tender of yet another totally baseless amended complaint after entry of judgment and the consequent burden of pursuing the obvious defenses thereto has the potential to further deter and prejudice Respondents in the exercise of those rights. Where such bad faith is present, leave to amend is properly denied. *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.,* 392 F.2d 380, 384 (C.A. 2, 1968); *Strauss v. Douglas Aircraft Co.,* 404 F.2d 1152 (C.A. 2, 1968).

CONCLUSION

The ruling of the Court of Appeals herein does nothing more than reiterate the long-standing rule of law that the considerations of the Sherman Act are and must continue to be secondary to the protection of rights to free expression secured by the First Amendment. Nothing therein even suggests the legal calamity which Petitioners prognosticate in their petition. Indeed, the only legal calamity present in this

litigation has been the chilling effect that the defense hereof has had upon this Respondent's right to free expression of political opinion during its pendency and the potential future abuse which those rights will suffer should Petitioners be permitted to further pursue this baseless action. The petition for writ of certiorari should be denied.

Dated, February 22, 1977.

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